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No. 98-266

In the

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SUPREME COURT, U.S.

Supreme Court of the United States

October Term, 1998

ANNE ARUNDEL COUNTY, MARYLAND,
Petitioner,

v.

JOHN WEST, *et al.*,

and

UNITED STATES OF AMERICA,
Respondents.

ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

BRIEF IN OPPOSITION FOR RESPONDENTS JOHN WEST, *et al.*,

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COUNTER STATEMENT OF QUESTIONS PRESENTED

1. Whether the Fair Labor Standards Act § 7(k) partial overtime exemption for "employee[s] in fire protection activities" applies to emergency medical technicians who, on the undisputed facts as found by the lower courts, "perform mostly medical services and work related to medical services" in situations that "did not involve fire suppression at all"?

2. Should the Court reconsider and overrule its decision in *Garcia v. San Antonio Metro. Transit Auth.*, 469 U.S. 528 (1985) holding that Congress acted constitutionally in extending the Fair Labor Standards Act – a federal law of general application – to the States and localities?

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BRIEF IN OPPOSITION FOR RESPONDENTS, JOHN WEST, *et al.*

COUNTER STATEMENT OF THE CASE

This is a Fair Labor Standards Act (FLSA) "overtime pay" case. The plaintiffs (and respondents in this Court) are "current or former employees of the Anne Arundel County Fire Department ... known as Emergency Medical Technicians or EMT's." Pet. App. 81a. The defendant (and petitioner in this Court) is Anne Arundel County, Maryland.

The crux of this case, as the Court of Appeals stated it, is this:

> EMTs were compensated for overtime hours according to the partial exemption for fire protection and law enforcement employees in section 7(k) of the FLSA, 29 U.S.C. §207(k), rather than the general forty-hour standard set forth in section 7(a) of the FLSA, 29 U.S.C. §207(a).
>
> Plaintiff EMTs filed suit challenging their classification as fire protection employees and seeking lost overtime pay, liquidated damages, prejudgment interest, and attorney's fees. The district court granted plaintiffs summary judgment, finding that they did not fall under the section 7(k) exemption ... Plaintiffs were awarded prejudgment interest but no liquidated damages, and the

> court applied a two-year statute of limitations to their claims. [Pet. App. 82a.]

In all these respects, on Anne Arundel County's appeal, the Court of Appeals (in an opinion by Wilkinson, C.J.) affirmed the District Court. Pet. App. 91a-98a.[1]

Very simply stated, the FLSA generally provides for overtime pay for covered employees who work more than forty hours in a week and the Act contains certain full and partial exemptions from that standard. One such partial exemption is stated in FLSA §7 (k), 29 U.S.C. § 207(k). That section, insofar as relevant here, applies to "employee[s] in fire protection activities." The §7(k) partial exemption provision, "outlines a special overtime system for employees of public agencies engaged in fire protection ... activities. As construed by the Department of Labor, this section mandates that time-and-a-half be paid to fire protection workers for every hour worked in excess of fifty-three per workweek." Pet. App. 88a-89a.[2]

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[1] The court below reversed the District Court's grant of summary judgment with regard to the plaintiffs who were classified as Lieutenants and Captains on an unrelated issue pertaining to the executive exemption to the FLSA overtime requirement. Pet. App. 99a.

[2] Section 7(k) also provides a similar partial exemption for "employees engaged in law enforcement activities."

The FLSA does not define, or otherwise elaborate, the statutory phrase "fire protection activities." The Labor Department, as the Department entrusted with the enforcement of the Act, has, however, issued regulations doing so. The basic regulation, 29 C.F.R. §553.210, provides in relevant part:

> (a) As used in sections 7(k) ... of the Act, the term "any employee ... in fire protection activities" refers to any employee (1) who is employed by an organized fire department or fire protection district; (2) who has been trained to the extent required by State statute or local ordinance; (3) who has the legal authority and responsibility to engage in the prevention, control or extinguishment of a fire of any type; and (4) who performs activities which are required for, and directly concerned with, the prevention, control or extinguishment of fires, including such incidental non-firefighting functions as housekeeping, equipment maintenance, lecturing, attending community fire drills and inspecting homes and schools for fire hazards ... The term would also include rescue and ambulance service personnel if such personnel form an integral part of the public agency's fire protection activities. See §553.215. [Pet. App. 106a-107a].

Section 553.215, referred to in the foregoing, covers only "ambulance and rescue service employees of

a public agency *other than* a fire protection ... agency" (emphasis added). Thus, that provision is not directly addressed to the EMT employees here who *are* employed by a fire protection agency. It adds:

> (a) Ambulance and rescue service employees of a public agency other than a fire protection or law enforcement agency may be treated as employees engaged in fire protection or law enforcement activities of the type contemplated by sections 7(k) and 13(b)(20) if their services are substantially related to firefighting or law enforcement activities in that (1) the ambulance and rescue service employees have received training in the rescue of fire, crime, and accident victims or firefighters or law enforcement personnel injured in the performance of their respective, [sic] duties, and (2) the ambulance and rescue service employees are regularly dispatched to fires, crime scenes, riots, natural disasters and accidents. As provided in §553.213(b), where employees perform both fire protection and law enforcement activities, the applicable standard is the one which applies to the activity in which the employee spends the majority of work time during the work period. [Pet. App. 109a]

And, 29 C.F.R. §553.212, which *is* directly addressed to the situation of the EMT employees here, provides the so-called 20 percent rule and the final

overlay to the "employee in fire protection activities" standard:

> (a) Employees engaged in fire protection ... as described in § 553.210 ..., may also engage in some nonexempt work which is not performed as an incident to or in conjunction with their fire protection.... The performance of such nonexempt work will not defeat ... the ... exemptions unless it exceeds 20 percent of the total hours worked by that employee during the workweek or applicable work period. A person who spends more than 20 percent of his/her working time in nonexempt activities is not considered to be an employee engaged in fire protection ... activities for purposes of this part. [Pet. App. 108a].

On the Plaintiffs' Motion for Summary Judgment, the District Court, applying the foregoing regulations to the undisputed facts here, ruled that the EMT employees are *not* "employees in fire protection activities." Pet. App. 17a. As we have noted, the Court of Appeals affirmed. That court set out its basic rationale as follows:

> The County relies on the regulatory definition of "fire protection activities," which "include[s] rescue and ambulance service personnel if such personnel form an integral part of the public agency's fire protection activities." 29 C.F.R. §553.210.

> The County, however, has not shown that EMTs' activities integrally relate to the Fire Department's fire protection activities. Further, we agree with plaintiffs that 29 C.F.R. §553.212(a) directs the conclusion that EMTs are not employees engaged in "fire protection activities." This regulation plainly imposes an across-the-board limitation on the amount of non-fire-fighting work that employees may perform and still qualify as fire protection employees under 29 U.S.C. §207(k)…

Then with regard to the application of § 553.212 to the facts of the case the Court of Appeals held:

> Plaintiffs do not qualify as fire protection employees because they exceed [§553.212's] twenty percent limit [on "nonexempt activities"]. EMTs perform mostly medical services and work related to medical services. As such, they are medical personnel rather than firefighters.... The record shows that, during the period at issue in this lawsuit, at least eighty percent of the Fire Department's calls required only emergency medical services and did not involve fire suppression at all. Medical services which are not rendered at the scene of any fire do not qualify as exempt activities.... Moreover, when the Fire Department did respond to a fire call,

> EMTs were prohibited by standard operating procedure from engaging in fire suppression activities. In light of this evidence that plaintiff EMTs generally did not – and could not – fight fires, it cannot be said that "fire protection activities" comprised more than eighty percent of their work. [Pet. App. 89a-91a].

ARGUMENT

The Fair Labor Standards Act § 7(k) question presented by this case is a fact-intensive law-application question that arises at the outer margin of that provision. That question was correctly decided by the Court of Appeals in its decision affirming the District Court. And, the decision below – in its approach, in its rationale and in its conclusion – is consistent with the other court of appeals decisions treating the same question. The certiorari petition's "First Question Presented" is, therefore, not worthy of further review.

The second question presented by the certiorari petition – asking this Court to reconsider, and to reverse, *Garcia v. San Antonio Metro. Transit Auth.*, 469 U.S. 528 (1985) – is equally unworthy of this Court's consideration. The *stare decisis* principle makes such action an extraordinary last resort. And, Anne Arundel County has not come anywhere close to making a case for reconsidering and reversing *Garcia's* ruling that congressional action to cover the States and localities with regulatory laws of general application – such as the FLSA – is constitutional.

1. The FLSA § 7(k) Question

A. "Fire protection activities." FLSA § 207(k) provides for one of several partial exemptions to the general FLSA overtime pay standard. That exemption, as its express language makes plain, applies to "employee[s] in fire protection activities" and only to such employees – and *not* to all employees of fire departments.

Thus, it is well settled in the lower court cases that the task in a §7(k) case is to determine whether the employees in question are "employees in fire protection activities" and that doing so entails applying the Labor Department regulations to the employees' activities.

That is how the courts below proceeded here. Their conclusion was that it is plain beyond dispute that under the regulations and on the facts, the Anne Arundel County Fire Department Emergency Medical Technicians are *not* "employee[s] in fire protection activities."

The Court of Appeals stressed that the Anne Arundel County EMTs "perform mostly medical services and work related to medical services"; that eighty percent of their calls "required only emergency medical services and did not involve fire suppression at all;" and that "when the Fire Department did respond to a fire call, EMTs were prohibited by standard operating procedure from engaging in fire suppression activities." Pet. App. 90a-91a.

Thus, the Anne Arundel County EMTs are *not* employees who have "legal authority and responsibility to engage in the prevention, control or extinguishment of a fire," 29 C.F.R. §553.210; do *not* "form an integral part of the public agency's fire protection activities," *Id.*, and *do* "spend more than twenty percent of [their] working time in nonexempt [i.e., non-fire protection] activities," 29 C.F.R. §553.212, namely, "providing only emergency medical services [that] did not involve fire suppression at all." Pet. App. 90a.

As the Court of Appeals put it, the Anne Arundel County EMTs "are medical personnel rather than firefighters." Pet. App. 90a. The EMTs' activities are essentially the same as the activities of emergency medical technicians who day-in and day-out respond to medical emergencies having nothing to do with fires, who are employed by and based in a county hospital, and who are indisputably outside the §7(k) partial exemption.[3] That being so, the EMTs here are not "employees in fire protection activities." As the Labor Department regulations make plain, "fire protection activities" are those that are "required for and directly concerned with the prevention, control or extinguishment of fires," 29 C.F.R. § 553.210, not those required for or directly concerned with emergency medicine.

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[3] If Congress had intended to include employees in emergency medical activities in § 7(k) that could easily have been done by including a parenthetical in the statute such as the one adding "security personnel in correctional institutions" to §7(k).

B. No Conflict in the Circuits. The *certiorari* petition attempts to generate a law question by claiming that the decision below "conflicts with the decision of the Eighth Circuit in *Christian v. City of Gladstone*, 108 F.3d 929 (8th Cir.), *cert. denied,* 118 S. Ct. 557 (1997) as well as the decision of the Fifth Circuit in *Bond v. City of Jackson*, 939 F.2d 285 (5th Cir. 1991)." Pet. 16.[4]

What the petition seizes is that in both *Christian* and *Bond* the courts concluded that individuals who were denominated "emergency medical technicians" or "emergency medical service paramedics" were "employee[s] in fire protection activities" covered by the §7(k) partial overtime exemption. What the petition would ignore is that in both cases the employees' predominant activities were what the Labor Department regulations recognize to be "fire protection activities"

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[4] The petition introduces its conflict claim with an abstract discussion of supposed differences in the case law – characterized as a "variety of tests" – on the proper approach to fitting 29 C.F.R. § 553.210 and 29 C.F.R. §553.215 together. Pet. 14-15. That discussion, and the cases cited therein, are wholly irrelevant to this case. Indeed, the petition admits as much by stating that it "is unclear whether the Fourth Circuit applied any [such] test in its opinion." *Id.* at 15. The reason why the Fourth Circuit did not venture into any of these deeper waters is straight forward. The only time this relationship matters is when an EMT would not be an "employee in fire protection activities" under a §553.210/§553.212 test but would be under a combined §553.210/§553.212/§553.215 test. And, in this case, as the courts below recognized, the EMTs were not "employees in fire protection activities" because, on the facts of this case, they did not meet either test.

and that the Eighth Circuit and Fifth Circuit decisions apply and follow the regulations in that relevant regard. In the instant case, in contrast, the EMTs' predominant activities, as the same regulations recognize, were not "fire protection activities" and the Fourth Circuit decision applies and follows the regulations in that equally relevant regard. Where different cases are decided differently by following a single legal approach designed to generate different ultimate conclusions in different factual situations, the decisions are consistent with each other, *not* in conflict.

In *Bond*, the Fifth Circuit relied on 29 C.F.R. §553.215(a) which looks to whether EMTs "have received training in the rescue of fire … and accident victims …" and are "regularly dispatched to fires … and accidents" as a test of whether such employees are employees engaged in fire protection activities. Pet. App. 109a. The Fifth Circuit's *Bond* decision applies that regulation to the EMTs' own testimony that "they received such training" and that they "spend *most* of their time responding to accidents." 939 F.2d at 288 (emphasis added).

In the instant case, in contrast, the EMTs spend most of their time "providing emergency medical services [that] did not involve fire suppression at all." Pet. App. 90a. They spend relatively little time responding to accidents, and even then respond to provide emergency medical services – not to rescue the victims. The Fifth Circuit pointed out that the *Bond* EMS personnel "often work side-by-side with

firefighters at the accident scene" and that "[o]ver ninety percent of the calls to which EMS ambulances respond are co-response calls, meaning that the ambulance is accompanied by additional units from the fire department." *Id.* at 286, 288. In Anne Arundel County, on the other hand, the Court of Appeals emphasized that "at least eighty percent of the Fire Department's calls required *only* emergency medical services." Pet. App. 90a. (Emphasis added).

In *Christian* the Eighth Circuit made it explicit that the "central consideration" that dictated the result there was one that is *not* present in this case and did so in a way that approves the reasoning and result in this case:

> A central consideration under the [§553.210(a)] test is whether an employee actually fights fires. *See Carlson v. City of Minneapolis*, 925 F.2d 264, 265 (8th Cir. 1991) (per curiam) (arson investigators who did not fight or extinguish fires not fire protection employees under four-part test). *Paramedics who are not permitted to fight fires or enter a burning building and who are only dispatched to fires to treat injured individuals are not engaged in fire protection activities under the four-part test. Nalley v. Baltimore*, 796 F.Supp. 194, 200 (D. Md. 1992). The paramedics here are sworn firefighters, however, and they respond to every fire alarm where a fire has been confirmed, as well as some alarms where a fire has not been confirmed, amounting to approximately

> 50% of all fire alarms each year. They fight fires at those alarms, constitute over 40% of the public safety officers in the fire/ems bureau and on each shift, and perform fire protection support services such as equipment maintenance and training. The four-part test has no requirement that firefighting be the employees' only or primary duty, and the fact that the paramedics are also able to provide medical services while at fires and elsewhere does not eliminate their responsibility for firefighting. These paramedics are employees in fire protection activities under the four-part test in §553.210(a) … [108 F.3d at 932 (emphasis added)].[5]

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[5] The *Christian* decision hews to the same line – and the same emphasis on the dispositive significance of the paramedics' primary firefighting activities in its consideration of the significance of 29 C.F.R. 553.212:

> Here, the stipulated facts show that the paramedics respond to fires, fight them, and provide paramedic services at those fires, as well as on calls not involving fires. Nearly all of their time is spent on such activities, related training, support services, and waiting for calls, and they do not spend much time on activities unrelated to their firefighting or emergency medical service activities. Providing paramedic services on accident and medical emergency calls not stemming from a fire or car accident does not alter the nature of their duties or cause them to perform tasks unrelated to their job.

(continued...)

The case relied upon by the Eighth Circuit, *Nalley v. Baltimore City*, was a companion case to the instant case in the District Court, and was decided by that court on the same day as the instant case, on the same rationale and with the same ultimate conclusion.[6] Thus, *Christian's* approving citation of *Nally* and its recognition of the difference between the situation there and the situation in *Nally* (and here) belies the claim that *Christian* and the instant case are in conflict.

In sum, the *certiorari* petition's claim that there is a conflict is spurious. The lower courts have uniformly applied the § 7(k) exemption and its attendant Labor Department regulations to the varying facts of each case and followed the regulations and the facts to their conclusion. The cases reach different conclusions, not because of a disagreement about the law, but because the EMTs' activities in each case are, under the regulations different in kind.

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[5](...continued)

> The district court thus erred by considering time spent on paramedic activities not stemming from a fire or car accident as nonexempt. Section 553.212 does not apply here to defeat the partial overtime exception for the paramedics. [108 F.3d at 934.]

[6] *Christian* cites *Nalley* rather than the instant case because the District Court had only *Nalley* reported in the Federal Supplement but not its companion decision herein.

C. The Correctness of the Decision Below. The *certiorari* petition challenges the merits of the decision below by arguing that *all* "ambulance and rescue service personnel" are "employees in fire protection activities" covered by the special FLSA §7(k) partial exemption. Pet. 17-20. That is so, says Anne Arundel County, by reason of FLSA legislative history allegedly showing that Congress so intended, or by reason of *Gregory v. Ashcroft*, 501 U.S. 452 (1991) which, it is said, requires that the §7(k) exemption be read to include all ambulance and rescue service personnel without regard to the fair reading of the statutory words or to a proper understanding of the legislative history.

It bears special emphasis that these arguments have been rejected by the Labor Department and the lower courts and that neither has ever been accepted by the Department or by any court. And, with good reason – both arguments are without any substance.

It is, of course, doubtful in the extreme that any legislative history could translate the explicit §7(k) statutory language – "employee[s] in fire protection activities" and "employee[s] in law enforcement activities" – into a partial exemption for "ambulance and rescue service personnel" as a class. And, there is no legislative history showing a congressional intent to put all emergency medical employees into §7(k). The Labor Department in the commentary that accompanied its §7(k) regulations carefully explained that the legislative history does not support the interpretation of §7(k) put

forward by the National League of Cities there and by Anne Arundel County here:

> The NLOC [National League of Cities] and others suggested that this section be revised so as to treat ambulance and rescue service personnel as fire protection employees ... regardless of whether such personnel form an "integral part" of the ... fire protection activities.
>
> The legislative history of the 1974 Amendments which added sections 7(k) and 13(b)(20) [exempting small fire departments of less than six employees] to the FLSA clearly indicates that only those employees who are engaged in ambulance or rescue service activities which are *substantially related* to fire protection or law enforcement activities can qualify for these exemptions.
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> * * *
>
> It is noted that the language of the version of section 13(b)(20) proposed by the House ... would have provided a complete overtime exemption for firefighters.... The House-Senate conferees, however, specifically added language to the final versions of sections 13(b)(20) and 7(k) which limits these exemptions to individual employees who themselves are engaged in fire protection ... [52 Fed. Reg.

2022 (Jan. 16, 1987) (emphasis in original).][7]

Nor does *Gregory v. Ashcroft*, *supra,* provide Anne Arundel County any comfort in this case. *Gregory* treats with an issue far removed from the issue in this case – the proper interpretive approach to ambiguous federal statutory coverage provisions. And *Gregory* holds that where it is Congress' purpose to provide for coverage that "would upset the usual constitutional balance of federal and state power," Congress must provide a clear statement of its intent to mandate such coverage in the statute itself. *Id.* 501 U.S. at 456-70.

Congress has clearly stated its intent to cover public emergency medical personnel by the FLSA. The only question is whether EMS employees are covered by the Act's general forty hour overtime standard or by the special §7(k) fifty-three hour standard. In this context, the well settled FLSA rule of statutory interpretation is that exemptions are to be construed narrowly and that the burden is on the employers to demonstrate that the

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[7] The floor statements cited at Pet. 18-19 (120 Cong. Rec. 7317 and 7318) pertain a broader predecessor to FLSA § 7(k) in a House Bill that was *not* enacted into law. And, Rep. Quie's statement cited at Pet. 19 (120 Cong. Rec. 8598) cuts against the County in that Representative Quie stated that the exemption covered only employees engaged in activities "substantially related to *fire protection*" and "rescue and ambulance work associated with *fire protection*. . ." *Id.* at 8598, not emergency medical work related to heart attacks and the many other medical emergencies which give rise to the majority of emergency medical activities.

exemption applies. *A.H. Phillips, Inc. v. Walling*, 324 U.S. 490, 493, (1945). *See also Citicorp Industrial Credit, Inc. v. Brock*, 483 U.S. 27 (1987). Nothing in *Gregory* suggests, much less holds, that where coverage is clear this general FLSA rule of interpretation no longer applies with full force.

It is also to the point that the decision regarding whether the §7(k) exemption applies does not implicate the federalism interest protected by *Gregory* – "the authority of the people of the States to determine the qualifications of their most important government officials...." 501 U.S. at 463. As the Second Circuit put it in upholding the payment of standard overtime to state investigators, "a requirement that the State pay overtime to ... investigators is not so intrusive as to strike at 'the heart of representative government.'" *Reich v. New York*, 3 F.3d 581, 589-90 (2nd Cir. 1993) *cert. denied*, 510 U.S. 1163 (1994) (quoting *Gregory* 501 U.S. at 463). *See also Biggs v. Wilson*, 1 F.3d 1537, 1544 (9th Cir. 1993).

We believe the foregoing is dispositive on the FLSA § 7(k) issue presented in this case, but given the *certiorari* petition's apocalyptic tone, we would be remiss if we did not add that the issue here is at § 7(k)'s outer margin and thus of the most limited general significance.

The point of § 7(k), as both its statutory language and its legislative history show, is to permit public employers to set "tour of duty" schedules for *firefighters* and *police officers* that entail more than forty hours of

work for certain work weeks without generating an overtime pay obligation. The Labor Department regulations, its opinion letters and the lower court decisions more than carry out that purpose. Those regulations give generous definitions of "employee[s] in fire protection activities" that fully encompass the understanding of their scope of application at the time the FLSA was amended and the general understanding of the statutory words.

The result is that public employers have enjoyed – and after this decision will continue to enjoy – the operational flexibility in carrying out their firefighting and peacekeeping programs they have historically enjoyed. Contrary to Anne Arundel County's argument, the FLSA does not inhibit "the operation of a local government fire department and its ability to continue to provide emergency services," (Pet. 11) any more than it inhibits Ford Motor Company's ability to build cars.

2. The *Garcia v. San Antonio Metropolitan Transit Authority* Question

The *certiorari* petition (at pp. 13-14; 21-27), makes it plain that its FLSA § 7(k) question is a stalking horse – and a lame one at that – by asking the Court to reconsider *Garcia v. San Antonio Metro. Transit Auth.*, 469 U.S. 528 (1985). Essentially the County requests the Court to overrule *Garcia's* square holding that Congress acted within its Article I Commence Clause powers, without trenching on the Tenth Amendment, in extending the FLSA to public employers.

The *stare decisis* principle stands squarely against Anne Arundel County's request. And, as we now show, *none* of the "prudential and pragmatic considerations designed to test the consistency of overruling a prior decision with the ideal of the rule of law and to gauge the respective costs of reaffirming and overruling a prior case," *Planned Parenthood of Southern PA v. Casey*, 505 U.S. 833, 854 (1992), point toward reconsidering and overruling *Garcia*.

This Court has noted that the *Garcia* rule is one of limited scope concerning "the authority of Congress to subject state governments to *generally applicable laws*." *New York v. United States*, 505 U.S. 144, 160 (1992) (emphasis added). That is of critical significance in two regards.

First, federal laws that are generally applicable throughout the private and public sector are, by their nature, inherently unlikely to require State compliance that would "directly impair [the State's] ability to structure integral operations in areas of traditional governmental functions." *Hodel v. Virginia Surface Mining & Recl. Assn.*, 452 U.S. 264, 287-288 & n. 29 (1981) (quoting *National League of Cities v. Usery*, 426 U.S. 833, 845 (1976)). Certainly, the last 15 years experience shows that the FLSA's modest minimum employment standards applicable only to lower level

employees, work no such impairment – Anne Arundel County cites nothing to the contrary.[8]

Second, and equally to the point, the *Garcia* rule, recognizing the constitutionality of such federal laws of general application, has brought order and predictability to an area of constitutional law that had known neither. At every iteration this Court's case law on the Commerce Clause/Tenth Amendment has recognized that Congress has the authority to apply general regulatory laws to the States in their "proprietary functions." The point of contention had been the application of such laws to the States in their "traditional governmental functions." And, the difficulty was that in that context, as in the tax immunity context, the governmental/proprietary dichotomy proved "unworkable." *See Garcia,* 469 U.S. at 537 - 47.

Garcia purified and simplified the constitutional law by following the tax immunity example and by purging the Commerce Clause/Tenth Amendment jurisprudence of what had proved to be an unworkable doctrinal gloss. The Court has continued to follow *Garcia's* approach. As the court below pointed out:

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[8]We note that it comes with particularly poor grace for the County to attack the special exceptions that run *in favor of* public employers as "special directives" that somehow put the public employers in a worse position than if the FLSA had been extended to the public sector *in haec verba*. *See* Pet. 23-24.

> As recently as last term the Court refused to grant immunity from suit under 42 U.S.C. § 1983 for private sector employees performing a "governmental function" on grounds that a "purely functional approach bristles with difficulty, particularly since, in many areas, government and private industry may engage in fundamentally similar activities." *Richardson .v McKnight,* 117 S.Ct. 2100, 2106 (1997). [Pet. App. 86a].

In contrast, no post-*Garcia* case so much as suggests revival of the "governmental/proprietary" dichotomy for judging the constitutionality of federal enactments. It is telling that in the end all that Anne Arundel County offers in place of the *Garcia* rule is a rule based on that unworkable dichotomy and a return to the complexity and confusion of the pre-*Garcia* regime.

Over the past 15 years, the *Garcia* rule has, moreover, engendered just the kind of "reliance that would ... add inequity to the cost of repudiation." *Planned Parenthood of Southern PA v. Casey*, 505 U.S. at 854. Public employees have come to rely on the FLSA as their assurance of the basic labor standards that characterize a civilized society. And, public employers – with the few holdouts such as Anne Arundel County's Fire Department – have arranged their relationships with their employees in a manner that takes proper account of the FLSA.

In the final analysis, Anne Arundel County's case for reconsidering and overruling *Garcia's* "laws of general application" rule comes down to the claim that the Court's Federalism decisions from *New York v. United States, supra,* through *Printz v. United States,* 117 S.Ct. 2365 (1997) have "so far developed" a set of "related principles of law" as to have left the *Garcia* rule "no more than a remnant of abandoned doctrine." *Planned Parenthood of Southern PA v. Casey*, 505 U.S. at 855.

There has been no such erosion of the *Garcia* "laws of general application" rule. None of the cases the *certiorari* petition cites had anything to do with the constitutionality of applying such laws to the States. And, both *New York* and *Printz* explicitly recognize that the Tenth Amendment question being considered and the *Garcia* question are conceptually distinct. As Justice O'Connor put it in *New York*:

> Most of our recent cases interpreting the Tenth Amendment have concerned the authority of Congress to subject state governments to generally applicable laws.... This litigation presents no occasion to apply or revisit the holdings of any of these cases, as this is not a case in which Congress has subjected a State to the same legislation applicable to private parties. [505 U.S. at 160-61].

See also Printz, 117 S.Ct. at 2383.

Consistent with that recognition, *New York* and *Printz* rule that federal laws addressed *solely* to the States that "commandeer" the State's core legislative and executive functions transgress the Tenth Amendment and both decisions do so in a manner that recognizes the continued vitality of the *Garcia* "laws of general application" rule. Indeed, in *Auer v. Robbins*, 117 S.Ct. 905 (1997), an FLSA case raising statutory questions on the "salary basis" test for determining whether the Act's executive exemption applies, the Court reaffirmed *Garcia's* continuing vitality by stating: "In 1974, Congress extended FLSA coverage to virtually all public-sector employees ... and in 1985 we held this exercise of power consistent with the Tenth Amendment [in *Garcia*]." 117 S.Ct. at 909.[9]

The sum of the matter is that over the past 15 years the *Garcia* "laws of general application" rule has proved workable in both practical and doctrinal terms. Nothing the Court has done or said since has diminished that rule's vigor or otherwise put it into question. And, while Anne Arundel County suggests that the *Garcia* rule gives too much deference to the federal "political process" and thereby stands as an obstacle to the full and proper development of the Tenth Amendment's

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[9] *United States v. Lopez*, 514 U.S. 549 (1995) and *Seminole Tribe of Fla. v. Florida*, 517 U.S. 549 (1996) (cited Pet. 22) were not Tenth Amendment cases and do not contain a word addressed to *Garcia's* rule or its rationale. And, while *Gregory v. Ashcroft, supra,* (also cited Pet. 22) did raise Tenth Amendment issues, none were decided and again nothing in the decision speaks to the *Garcia* rule.

protection of state sovereignty, *New York* and *Printz* demonstrate the contrary. There is no consideration of any substance, then, that supports the extraordinary step of departing from the *stare decisis* principle by reconsidering and overruling *Garcia*.

CONCLUSION

For the reasons stated, the petition should be denied.

Respectfully submitted,

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